Supreme Court, U.S.
FILED

No. _____
10-84

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In The
Supreme Court of the United States

TERRI CRANDALL AND JOANN HUBBARD,

Petitioners,

v.

CITY AND COUNTY OF DENVER, COLORADO,
D/B/A THE DENVER INTERNATIONAL AIRPORT,
A COLORADO POLITICAL SUBDIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit Court of Appeals erred in failing to enter a permanent injunction against full-aircraft gate deicing at Denver International Airport, making mandatory and permanent Denver's "voluntary" abatement of conduct that may present an "imminent and substantial endangerment" as defined by the citizen suit provision of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6972(a)(1)(B).

LIST OF PARTIES

Petitioners:	Terri Crandall and JoAnn Hubbard
Respondent:	City and County of Denver, Colorado, d/b/a The Denver International Airport, a Colorado political subdivision

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PETITION FOR WRIT OF CERTIORARI

Terri Crandall and JoAnn Hubbard ("Petitioners") hereby petition this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

On April 24, 2008, the United States District Court for the District of Colorado presented its oral ruling in favor of Respondent and entered judgment against Petitioners on April 24, 2008. That oral ruling is unpublished and is reproduced at App. 21-63. On February 8, 2010, the Tenth Circuit Court of Appeals affirmed the District Court decision in an opinion published at 594 F.3d 1231 and reproduced at App. 1-20.

JURISDICTION

The District Court had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to review the District Court's final judgment pursuant to 28 U.S.C. § 1291. The Tenth Circuit Court of Appeals filed its opinion on February 8, 2010 and Petitioners filed their Petition for Rehearing En Banc on February 26, 2010, which the court of appeals denied on April 13, 2010. Thus, pursuant to Supreme Court Rule 13, this Petition is filed timely within 90 days of the entry of

final judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 6972(a)(1)(B) of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901, *et seq.* ("RCRA") governs citizen actions for injunctive relief in circumstances that may present an imminent and substantial endangerment to human health and the environment. 42 U.S.C. § 6972(a)(1)(B) provides in relevant part as follows:

> (a) In general . . . any person may commence a civil action on his own behalf –
>
> * * *
>
> (1)(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

Article III, § 2, cl. 1, of the United States Constitution provides as follows:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioners filed this federal citizen suit, pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6972(a)(1)(B) ("RCRA") to rectify the well-known and widely reported but consistently neglected environmental problems at Denver International Airport ("DIA") and as a result sought injunctive relief to require certain measures to be implemented and undertaken by Denver at DIA through the authority of a Federal District Court order to ensure (1) that full-aircraft gate deicing did not reoccur at

DIA; (2) that certain basic abatement measures would be implemented in the appropriate areas of DIA; and (3) that a comprehensive environmental investigation appropriate in breadth and scope would be undertaken to address the problems DIA or provide a "clean bill of health" to allay legitimate concerns and fears of DIA workers that continue to the present day.

Ms. Crandall and Ms. Hubbard, while employed as Customer Service Representatives at DIA by United Airlines Inc. ("United"), personally witnessed serious environmental problems at DIA and personally experienced health-related impacts or effects resulting from long-standing and continuing environmental conditions at DIA. In addition, Petitioners witnessed others, similarly employed and working at DIA, experience similar health-related impacts or effects. Therefore, Petitioners sought through injunctive relief and an appropriately tailored order in Federal District Court a comprehensive indoor air quality investigation and vapor intrusion study to determine what environmental problems existed at Concourse B at DIA and to identify and implement the proper form of abatement or remediation in order to protect human health and the environment. Ms. Crandall and Ms. Hubbard sought no damages as part of their case, seeking only the certainty for themselves and their co-workers of being protected from environmental and human health hazards in their workplace at DIA.

After a five-day trial to the bench, the Federal District Court presented its findings of fact and conclusions of law by oral ruling on April 24, 2008. The District Court found for Denver and declined to issue any injunctive relief, contrary to the mandate of RCRA, to Petitioners. Judgment was entered in favor of Denver on April 24, 2008.

On February 8, 2010, the Court of Appeals for the Tenth Circuit affirmed the decision below. Ms. Crandall and Ms. Hubbard filed their Petition for Rehearing En Banc on February 26, 2010, which the Tenth Circuit Court of Appeals denied on April 13, 2010. This Petition followed.

REASONS FOR GRANTING THE PETITION

RCRA authorizes the commencement of a civil action to abate the "past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." RCRA 6972(a)(1)(B). Congress drafted RCRA "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any* risk posed by toxic waste." *Maine People's Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc.* 471 F.3d 277, 288 (1st Cir. 2006) (emphasis added).

It is undisputed that Denver's so-called "voluntary" cessation of the practice of full-aircraft gate deicing was a direct response to Petitioners' citizen suit. The Tenth Circuit declined to make mandatory and permanent Denver's voluntary cessation of full-aircraft gate deicing, a practice that "may present an imminent and substantial endangerment" as defined by RCRA. The failure of the Federal District Court and the Tenth Circuit to make mandatory and permanent Denver's voluntary, post-litigation abatement of the endangering practice eviscerates the citizen suit provision and frustrates the purpose of the statute to abate *any risk* of harm posed by solid or hazardous waste. This Petition should be granted to settle this important question of law: Can citizen suit defendants avoid liability under RCRA – both injunctive relief and liability for the plaintiffs' attorneys' fees and costs – by so-called "voluntary" cessation of the endangering practice provided in direct response to the filing and pursuit of a citizen suit under RCRA?

I. DENVER'S CESSATION OF THE ENDANGERING PRACTICE OF FULL-AIRCRAFT GATE DEICING WAS IN DIRECT RESPONSE TO PETITIONERS' CITIZEN SUIT AND CANNOT BE CHARACTERIZED AS "VOLUNTARY"

It is undisputed that, as of March 11, 2005 and in direct response to Petitioners' RCRA citizen suit, Denver banned full-aircraft gate deicing by United at

the gates of Concourse B, but continued to allow partial gate deicing. App. at 76-77 ("In light of the recent filing of the RCRA lawsuit . . . full aircraft deicing of any aircraft at the concourse gate will not be allowed as of March 11, 2005"). It also is clear that Denver and United share a strong interest in returning to full-aircraft gate deicing, postponing a return to the practice pending resolution of Petitioners' citizen suit and companion state litigation. App. at 75 and 78-80 (Denver "will do all possible to facilitate United gate deicing . . . United Legal Department and Airport Legal Department must resolve issues concerning employee claims/lawsuits prior to proceeding . . . "). Therefore, the decision to suspend Concourse B gate deicing was not truly "voluntary" as asserted by Denver and as inappropriately accepted by Federal District Court and the Tenth Circuit.

II. THE DISTRICT COURT AND TENTH CIRCUIT COURT OF APPEALS DECLINED TO MAKE MANDATORY AND PERMANENT THE CESSATION OF THE ENDANGERING PRACTICE

The Federal District Court found that, while Denver's cessation of full-aircraft gate deicing practices was voluntary and in response to Petitioners' citizen suit, any return to the practice of full-aircraft gate deicing was speculative. The Tenth Circuit left undisturbed this factual finding, modifying it slightly to state that "such a change would not be imminent."

Crandall, 594 F.3d at 1239. Both the District Court and the Tenth Circuit declined to make mandatory and permanent the ban on full-aircraft gate deicing practices at DIA because "resumption of full-plane gate deicing at Concourse B was not imminent, but merely speculative." *Id.* at 1240.

III. THE QUESTION OF WHETHER A CITIZEN SUIT DEFENDANT'S SO-CALLED "VOLUNTARY," POST-LITIGATION CESSATION OF THE ENDANGERING PRACTICE IS SUFFICIENT TO AVOID LIABILITY UNDER SECTION 6972 OF RCRA IS AN IMPORTANT QUESTION OF LAW THAT MUST BE SETTLED BY THIS COURT

Petitioners are not aware of other cases that have decided the question of whether a citizen suit defendant may avoid the reach of the RCRA citizen suit provision and escape the RCRA mandate simply by "voluntarily" ceasing the endangering practice, in direct response to a citizen complaint, without any further abatement or permanent restrictions against resuming in the endangering practice. There is no question federal courts possess the power and authority to make mandatory and permanent a defendant's voluntary cessation of a challenged practice. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000). At issue is whether the plain language and legislative intent and purpose of the

RCRA citizen suit provision demand that such voluntary cessation be made mandatory and permanent.

Notwithstanding the well-established authority of the federal courts to enter injunctive relief under these circumstances, the Circuits vary as to the proper standard for issuing an injunction pursuant to RCRA. For example, the Second Circuit has stated that RCRA authorized courts to order such injunctive relief "as [] necessary to correct a ***potential*** 'imminent and substantial endangerment to health or the environment.'" *87th Street Owners Corp. v. Carnegie Hill-87th Street Corporation*, 251 F. Supp. 2d 1215, 1220 (2d Cir. 2002) (emphasis added). Although the Tenth Circuit held that traditional equitable factors apply to an injunction ordered under RCRA, the Court held that "the primary focus shifts from irreparable harm to concern for the general public interest." *Wilson v. AMOCO Corp.*, 989 F. Supp. 1159, 1171 (10th Cir. 1998). The Third Circuit in *United States v. Price*, 688 F.2d 204 (3d Cir. 1982), held that Congress "intended to confer upon courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic waste." *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982). The First Circuit has not enumerated a set framework for determining the propriety of an injunction under RCRA, instead stating that, "in an environmental case, [the court] should consider the balance of relevant harms before granting injunctive relief." *Maine People's Alliance*

and Natural Resources Defense Council v. Mallinckrodt, Inc., 471 F.3.d 277, 296 (1st Cir. 2006).

A defendant's voluntary cessation of a challenged practice after the filing of suit should not deprive the court of the ability to enter injunctive relief. This has long been recognized in the context of citizen suits under the Clean Water Act, where courts have imposed civil penalties. *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 503 (3rd Cir. 1993). "Allowing a polluter to escape all liability through post-complaint compliance is at odds with the mandatory language of [the Clean Water Act citizen suit provision]." *Id.* The same rule should apply in the RCRA context, since to hold otherwise would encourage polluters to delay litigation as long as possible, knowing that they could escape all liability for even post-complaint violations by simply coming into compliance before a decision on the merits. This approach to a defendant's voluntary cessation of offensive conduct is not limited to whether a citizen suit complaint is moot, but whether relief may – indeed must – be granted under the statute to give meaning to the citizen suit provision at issue. "We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants." *Id.* citing *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993).

This question – whether the suddenly repentent defendant can escape RCRA's citizen suit liability and

enforcement by merely asserting that it has learned its lesson and voluntarily ceased the endangering practice – is one of great importance to these Petitioners and all future citizen suit plaintiffs and indeed strikes at the fundamental purpose for the Congressional enactment of the RCRA citizen suit statute.

CONCLUSION

Denver's "voluntary" suspension of its offensive conduct is nothing more than a litigation defense that offers no guarantee that the RCRA endangerment will not reoccur at any time in the future and makes a mockery of the citizen suit statute. The evidence shows Denver ordered the suspension as a direct result of the pending litigation filed by the Petitioners. The only witness to testify regarding future deicing practices indicated that he was not in a position to make any decisions with respect to deicing practices and procedures at DIA and had no control over whether full-aircraft gate deicing would resume at Concourse B. Nevertheless, the District Court and Tenth Circuit declined to issue injunctive relief in the form of a mandatory ban, through an appropriately tailored order of the court, on a return to full-aircraft gate deicing at DIA's Concourse B. The opinions of the District Court and Tenth Circuit decide an important question of law in a manner that provides citizen suit defendants a "Get Out of Jail Free" card if they simply stop or assert that they will stop the

endangering practice. This outcome eviscerates the citizen suit provision of RCRA and undercuts its fundamental purpose of enabling citizens to address endangering conduct that otherwise has gone unaddressed and thrusts directly upon citizen suit plaintiffs the costs and burden of enforcing RCRA contrary to the mandate of RCRA.

Respectfully submitted:

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Submitted July 12, 2010

594 F.3d 1231

United States Court of Appeals,
Tenth Circuit.
Terri **CRANDALL**; Joann Hubbard,
Plaintiffs-Appellants,
v.
CITY AND COUNTY OF **DENVER**, COLORADO,
d/b/a The **Denver** International Airport, a Colorado political subdivision, Defendant-Appellee.
No. 08-1197.

Feb. 8, 2010.

Frederick Ganz (John D. Fognani, Perry L. Glantz, and Fritz W. Ganz with him on the briefs), Fognani & Faught, PLLC, Denver, CO, for Plaintiffs-Appellants.

Andrew J. Carafelli (Chris Mattison and Peter Moyson with him on the brief), Hall & Evans, L.L.C., Denver, CO, for Defendant-Appellee.

Before HARTZ, HOLLOWAY, and TYMKOVICH, Circuit Judges.

HARTZ, Circuit Judge.

Plaintiffs Terri Crandall and JoAnn Hubbard sued for injunctive relief against the City and County of Denver under the citizen-suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972(a)(1)(B). Their concern is that aircraft deicing fluid (ADF), which can produce hydrogen-sulfide gas when it decomposes, endangers human health at Concourse B of the Denver International Airport. The gates on Concourse B are used

almost exclusively by United Airlines. Crandall is a United employee, and Hubbard is a former employee who now frequently uses Concourse B as a passenger. Plaintiffs seek (1) to prohibit full-plane deicing at Concourse B gates and (2) to require other precautionary steps relating to ADF.

Following a five-day bench trial, the United States District Court for the District of Colorado denied Plaintiffs relief. It found that Denver no longer permits full-plane deicing at the gates and held that Plaintiffs had not shown that the current use of ADF "may present an imminent and substantial endangerment to health," which is a prerequisite for RCRA relief. 42 U.S.C. § 6972(a)(1)(B).[1] The court also held that RCRA does not govern all the ADF by Concourse B at the Denver Airport, but only the ADF "that flows in storm water into [C]oncourse B and degrades in Concourse B." *Crandall v. City and County of Denver, Colorado,* No. 05-00242 at *27 (D.Colo.2008) (*in* Aplt. App., Vol. 1 beginning at 40) (Bench Ruling). The ADF that degrades outside the concourse, it said, was governed exclusively by permits issued under the Clean Water Act (CWA).

On appeal Plaintiffs argue that the district court misconstrued RCRA's requirements with respect to

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[1] This RCRA provision also governs waste that may present an imminent and substantial endangerment to the environment, but Plaintiffs have not pursued a claim of environmental endangerment.

injunctive relief. They also contend that the court erred in holding that the CWA, rather than RCRA, governs some of the ADF at the Denver Airport. We affirm the district court's denial of injunctive relief. Plaintiffs failed to demonstrate that ADF at the airport (whether it degrades inside or outside Concourse B) may present an imminent and substantial endangerment to health. Because relief under RCRA would therefore not be available even if RCRA governs the ADF that degrades outside the concourse, we need not address whether such ADF is governed exclusively by the CWA.

I. BACKGROUND

A. RCRA

RCRA is a comprehensive statute designed to reduce or eliminate the generation of hazardous waste and "to minimize the present and future threat to human health and the environment" created by hazardous waste. 42 U.S.C. § 6902(b); *see id.* § 6902(a). To achieve this goal, the statute "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with [RCRA's] rigorous safeguards and waste management procedures." *City of Chicago v. Envtl. Def. Fund,* 511 U.S. 328, 331, 114 S.Ct. 1588, 128 L.Ed.2d 302 (1994). It also grants private citizens standing to enforce some of the statute's provisions. *See* 42 U.S.C. § 6972; *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 484, 116 S.Ct. 1251,

134 L.Ed.2d 121 (1996). The RCRA citizen-suit provision invoked by Plaintiffs states:

> [A]ny person may commence a civil action on his own behalf –
>
> . . . .
>
> (B) against any person, . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous *waste which may present an imminent and substantial endangerment to health or the environment* [.]

42 U.S.C. § 6972(a) (emphasis added); *see Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir.2007) (summarizing citizen-suit provision).

B. ADF and the Denver Airport

Plaintiffs do not challenge the district court's rendition of the historical facts. We begin by discussing some pertinent science and then summarize the history of ADF use at the Denver Airport and the problems that have and have not arisen.

1. The Risks of ADF

ADF is mostly propylene glycol. When propylene glycol degrades in an anaerobic environment where

sulfur is present, hydrogen-sulfide gas can be produced. Hydrogen sulfide has a characteristically offensive odor, which often accompanies sewage or rotten eggs. It can be smelled at very low concentrations in the air. Some people can detect it at one part per billion, and almost all recognize it at 300 parts per billion. Much higher levels, however, are required before it has recognized health effects. "Eye irritation has been noted at between 5 and 30 parts per million – not billion"; "[m]arked eye and lung irritation occurs at 200 parts per million"; and "[b]reathing impairment and unconsciousness results at 1,000 parts per million." Bench Ruling at 12.

2. Conditions Through Early 2006

After ADF is used to deice an airplane, hydrogen-sulfide gas can enter Concourse B by two means. The ADF may degrade outside the concourse and the resultant gas then infiltrates the concourse. Or the ADF may mix with storm water and flow down through cracks in the tarmac. Because the concourse basement extends under the tarmac, this mixture can leak into the basement where the ADF degrades, producing hydrogen sulfide.

Until practices at the Denver Airport changed in 2005, some planes could be fully deiced with ADF while at their gates. Beginning in 1997, employees of United Airlines and others who worked at Concourse B filed a number of complaints about the rotten-egg smell and about health effects that are symptoms of

exposure to hydrogen sulfide. Some complaints linked the smell to degrading ADF. Maintenance logs and reports also indicated the presence of hydrogen sulfide in the basement, and one or two reports attributed the gas to ADF. A 1998 water-quality study made numerous recommendations to control the runoff of ADF into the Denver Airport's storm-water system.

Perhaps the most significant episode occurred in 2001, when many people complained of a foul odor and burning eyes in the Red Carpet Club in Concourse B. Air testing detected concentrations of hydrogen sulfide above one part per million. The Tri-County Health Department found that the gas flowed from the basement level up to the Red Carpet Club through the elevator shafts. A report by URS Corporation, a consultant retained by Denver, concluded that the hydrogen sulfide came from degrading ADF. As a result, the elevator shafts next to the club were sealed and measures were taken to prevent ADF from leaking into the basement of Concourse B. Denver began a program (which was still in effect at the time of trial) to seal cracks in the tarmac around the concourse, thus preventing ADF from entering the ground.

Despite these measures, in September 2005 maintenance logs reported toxic levels of hydrogen sulfide in a mechanical room in the basement of Concourse B and stated that employees were advised not to enter the room without proper safety equipment. Beginning about that time (the record does not

provide a precise date), Denver limited the amount of deicing that could be conducted at the gates. Planes were directed to deicing pads away from the gates and the concourse basement. Gate deicing was restricted to a few portions of the plane in certain circumstances. (The district court found the evidence insufficient to determine Denver's motives for moving deicing from the gates – whether it was a response to this lawsuit or more a matter of efficiency and economics.) In addition, in 2006 Denver installed ventilation fans in two of the twelve basement sump rooms and, as of trial, it anticipated installing fans in the remaining sump rooms.

3. Conditions After Early 2006

Even after full-plane deicing at the gates ceased at the Denver Airport, there were some reports of the odor of hydrogen sulfide in the basement of Concourse B. But the complaints were much fewer and not supported by objective evidence. The Center for Toxicology and Environmental Health, an independent engineering firm, conducted five air-quality tests between November 2005 and March 2008 at many sites in the concourse, but no hydrogen sulfide was detected. The district court concluded that currently "the evidence does not establish levels of either propylene glycol or hydrogen sulfide that are dangerous to human health" in the basement of Concourse B. *Id.* at 34.

A United Airlines official testified in April 2008 that United had no intent to request full-plane gate deicing after this litigation ends. He said that there had been discussions two years earlier about testing the use of glycol-recovery vehicles at the gates, apparently to determine whether they could reduce the flow of ADF into the environment after full-plane deicing. But United then decided not to spend the money necessary to acquire the vehicles. An airport official testified that Denver had no plans to allow United to return to full-plane deicing at the gates. He explained that the airport had added deicing pads and that gate deicing could create traffic congestion as inbound aircraft waited for gates where deicing was taking place. He also said that gate deicing would require new infrastructure to collect overspray and runoff.

C. District-Court Proceedings

Plaintiffs filed their RCRA suit on February 7, 2005. They sought orders requiring Denver to take various steps to protect people from hydrogen sulfide produced by degradation of ADF, including a prohibition on full-plane deicing at Concourse B gates.

After a five-day bench trial in April 2008, the district court entered judgment for Denver, ruling that Plaintiffs had failed to demonstrate that ADF may present an imminent and substantial endangerment at Concourse B. The court found that the evidence at trial was insufficient to establish that under current conditions at Concourse B the amounts of

ADF were significant or that hydrogen sulfide was present at levels dangerous to human health. The court also determined that the evidence was too speculative to show a significant risk that Denver would resume full-plane deicing at the gates. Although there was some evidence that Plaintiffs' lawsuit contributed to ending full-plane gate deicing, the court noted that the decision was likely influenced by the following "economic factors":

> the construction of new deicing pads away from Concourse B, greater capability in using the pads to deice, the impact of pad deicing on the speed and number of planes to be serviced, and a requirement of precedent testing, presumably environmental testing, as to the effect of deicing fluid, which United has been unwilling to perform.

Id. at 42.

In addition, the district court said that Plaintiffs had not shown that resuming full-plane deicing at the gates would pose a health risk. Denver was continuing a program to seal the tarmac around Concourse B, had installed fans in two of the twelve mechanical rooms in the basement in 2007, and had said that it planned to install fans in the remaining mechanical rooms in the concourse. The court noted that it was

"without evidence to balance the effect of future full-gate deicing against the effect of future fans." *Id.*[2]

II. DISCUSSION

"A party requesting a permanent injunction bears the burden of showing: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir.2003). "[W]e review the district court's grant or denial of a permanent injunction for abuse of discretion," *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir.1993), reviewing underlying questions of law de novo, *see Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir.2009). The dispositive issue in this case is whether Plaintiffs have established the merits of

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[2] The parties' briefs in this court dispute whether the district court erred in deciding that the CWA, and not RCRA, governs deicing chemicals that degrade outside Concourse B into hydrogen sulfide that enters Concourse B (leaving RCRA to govern only deicing chemicals that enter the basement of Concourse B as liquids). But we need not resolve this dispute. The district court made no findings regarding how much hydrogen sulfide was covered by RCRA and how much was left to the CWA, but found that even considering all sources of hydrogen sulfide, Plaintiffs had failed to demonstrate that the gas may present an imminent and substantial endangerment to health or the environment. Thus, the court's fact findings and judgment were independent of its view of the CWA.

their claim, the first requirement for a permanent injunction. *See Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir.2007).

To prevail under RCRA's citizen-suit provision, a plaintiff must prove that a solid waste "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Plaintiffs contend that they proved their health-endangerment claims but that the district court "erred in its interpretation of the meaning of 'imminent and substantial.'" Aplt. Br. at 17. Although they do not dispute that "the cessation of full aircraft gate deicing[ ] resulted in at least a partial abatement of the conditions giving rise to the risk of harm associated with the degradation of [ADF]", Reply Br. at 9, they argue that the possibility of resumption of such deicing presents an imminent and substantial endangerment. They maintain that Denver halted full-plane deicing at the gates because of this lawsuit, and they suggest that the practice likely will resume after the lawsuit if no injunction is issued. According to Plaintiffs, the district court also erred in assuming that Denver would install fans in the ten mechanical rooms. In Plaintiffs' view, the court should have ensured rather than assumed that Denver would not return to full-plane deicing at the gates and that it would install the remaining fans.[3]

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[3] Plaintiffs further argue that the balance of harms weighs in their favor, reasoning that Denver "will endure little harm or

(Continued on following page)

We are not persuaded. Our review of governing precedent persuades us that the facts here do not show that the ADF at the Denver Airport "may present an imminent and substantial endangerment to health." 42 U.S.C. § 6972(a)(1)(B). The leading case on the subject is the Supreme Court decision in *Meghrig*. The issue in *Meghrig* was whether § 6972(a)(1)(B) provides a remedy to recover for past cleanup costs. *See* 516 U.S. at 482, 116 S.Ct. 1251. After KFC Western, Inc. paid to clean up petroleum contamination on property previously owned by Alan and Margaret Meghrig, it sought restitution from the Meghrigs. *See id.* The Court held that RCRA's citizen-suit provision does not provide a remedy for past contamination that no longer poses a danger. *See id.* at 485-86, 116 S.Ct. 1251. It reasoned that "[a]n endangerment can only be imminent if it threatens to occur immediately." *Id.* at 485, 116 S.Ct. 1251 (internal quotation marks omitted). The language *may present,* it explained, "implies that there must be a threat which is present *now,* although the impact of the threat may not be felt until later." *Id.* at 486, 116 S.Ct. 1251 (internal quotation marks omitted).

We followed *Meghrig* in *Burlington Northern.* Burlington Northern alleged that the defendant's

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hardship in complying with an injunction" prohibiting a return to full-plane deicing at the gates because the injunction would maintain the status quo. Aplt. Br. at 23. But because Plaintiffs have not succeeded on the merits, we need not address this factor in assessing the propriety of injunctive relief.

earth-moving construction on his property had caused tar-like material (TLM) to migrate onto Burlington Northern's property. *See* 505 F.3d at 1018. Burlington Northern removed the TLM from its property and constructed a berm on the property line to prevent future migration. *See id.* The district court granted summary judgment against Burlington Northern, ruling that it "had failed to present a genuine issue of material fact on the 'imminent and substantial endangerment' element of its RCRA claim." *Id.* (quoting § 6972(a)(1)(B)). The court concluded that

> imminency had not been established because (1) [Burlington Northern] failed to point to any person who had been injured by TLM or to any study establishing the material threatened to 'immediately' cause harm to a person or the environment, (2) neither the [Oklahoma Department of Environmental Quality] or the Environmental Protection Agency . . . had ever ordered the TLM removed, and (3) [Burlington Northern] monitored the alleged migration of the TLM onto its property for years without acting.

Id. at 1021.

We disagreed with the district court's analysis, stating that it was "irrelevant when the TLM was deposited on the property and equally irrelevant how long [Burlington Northern] monitored the TLM before acting." *Id.* We also stated that the focus should have been on the risk that harm would occur in the future, not on whether harm had occurred or was imminent.

See id. We explained the meanings of the statutory terms: "[A] finding of 'imminency,'" we said, "does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present." *Id.* at 1020. And we stated that "the term 'endangerment' . . . mean[s] a threatened or potential harm," *id.,* and that an endangerment is *substantial* when "there is reasonable cause for concern that someone or something may be exposed to risk of harm by release, or threatened release, of hazardous substances in the event remedial action is not taken," *id.* at 1021. Thus, the statutory requirement could be satisfied even if the actual harm might not be likely to occur for a long time, so long as the defendant's current or past actions create a present risk that the harm will eventually come to pass. *See id.* at 1020-21. We emphasized "that the operative word in § 6972(a)(1)(B) is 'may'"; a plaintiff need show only that the waste *may* present a threat of serious potential harm. *Id.* at 1020. Noting the evidence in the record that TLM contained carcinogens at levels exceeding EPA recommendations and that it threatened storm-water runoff and other waters, we reversed and remanded for further proceedings. *See id.* at 1022.

Most recently, in *Tyson Foods* we considered the same statutory language in reviewing whether the Oklahoma Attorney General was entitled to a preliminary injunction against Tyson's use of "'poultry litter'" (which includes poultry bedding materials and feces) as fertilizer in the Illinois River Watershed

(IRW). *See* 565 F.3d at 773-74. The state contended that bacteria in the poultry litter was contaminating the watershed. *Id.* at 774. Tyson responded that the bacteria in the IRW came from other sources and that the processing of poultry litter kills the bacteria before the litter is spread on land. *Id.* We agreed with the state that "under RCRA a plaintiff need not 'show proof of actual harm to health or the environment' to establish endangerment, but rather injunctive relief is appropriate where there simply *may* be a risk of harm." *Id.* at 777 (quoting *Burlington Northern,* 505 F.3d at 1020). Nevertheless, we concluded that "Oklahoma's inability to link land-applied poultry litter to the bacteria in the IRW preclude[d] a finding that such litter may present an imminent and substantial en dangerment. . . ." *Id.* at 778. Consequently, the state had failed to show that the litter "may be a risk of harm in the IRW waterways." *Id.* at 777.

The above cases did not have occasion to explore every context in which a solid waste "may present an imminent and substantial endangerment to health or the environment." But they do provide guidance. In particular, they illustrate that there is a limit to how far the tentativeness of the word *may* can carry a plaintiff. *Meghrig* tells us that an endangerment cannot be merely possible, but must "threaten[ ] to occur immediately." 516 U.S. at 485, 116 S.Ct. 1251 (internal quotation marks omitted). And although *Burlington Northern* recognizes that the harm may not occur for a long time, *see* 505 F.3d at 1020-21, *Tyson Foods* emphasizes that there is no

endangerment unless the present or imminent situation can be shown to present a risk of (later) harm, *see* 565 F.3d at 777.

One essential point that Plaintiffs appear to overlook is that although the harm may be well in the future, the *endangerment* must be imminent. *See Meghrig,* 516 U.S. at 486, 116 S.Ct. 1251 ("[T]here must be a threat which is present *now,* although the impact of the threat may not be felt until later." (internal quotation marks omitted)). Two examples may clarify the difference between harm and endangerment in the context of future harm. First, it may take a long time for a toxic substance from the solid waste to reach the object to be harmed. For instance, buried solid waste may present an endangerment if toxic chemicals from the waste will eventually seep into the water table and be consumed by humans. No *harm* will result for years, but the *endangerment* already exists because that harm can result if "remedial action is not taken" in the interim. *Burlington Northern,* 505 F.3d at 1021; *see Cox v. City of Dallas, Tex.,* 256 F.3d 281, 301 (5th Cir.2001) ("As the old waste decomposes, the cover soil can settle, ground and surface water can become contaminated with leachate, and dangerous gases can form and migrate underground. This meets the 'may present an imminent and substantial endangerment' standard.") (footnote omitted) (quoting § 6972(a)(1)(B)); *Dague v. City of Burlington,* 935 F.2d 1343, 1356 (2d Cir.1991) (similar), *rev'd in part on attorney-fee issue,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992). Second,

there may be a long period between the time that a toxic substance from the solid waste reaches the object to be harmed and the time that the harm manifests itself, as when the toxic substance eventually causes cancer. *See Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 279 n. 1 (1st Cir.2006) ("[I]f there is a reasonable prospect that a carcinogen released into the environment today may cause cancer twenty years hence, the threat is near-term even though the perceived harm will only occur in the distant future."). The essential point is that the solid waste presents an endangerment if harm may result absent further remedial measures.

It is here that the Plaintiffs' case fails. The risk presented by ADF is that human health can be injured if (1) sufficient quantities of ADF (2) degrade into sufficient quantities of hydrogen-sulfide gas, (3) which enter an area where humans are present. This risk, this endangerment, must be imminent for there to be a claim under RCRA. *See* § 6972(a)(1)(B). At the time of trial, however, there was no detectable hydrogen-sulfide gas in Concourse B, and no prospect of there being such gas; the gas could be a problem only if full-plane deicing were to be renewed at the concourse gates and the measures instituted by Denver were then to prove ineffective in protecting people from the gas. Thus, not only was there no imminent harm, but there was also no imminent endangerment. Nothing going on at the airport at the time of trial, or expected in the immediate future, would, even

without remedial measures, present a prospect of harm to human health. If nothing changed, there was simply no possibility of sufficient hydrogen sulfide in Concourse B to injure human health. It is not enough under RCRA that in the future someone may do something with solid waste that, absent protective measures, can injure human health. *See Meghrig,* 516 U.S. at 485-86, 116 S.Ct. 1251.

Plaintiffs' appellate briefs argue that the district court applied the wrong legal standard, requiring the imminence of actual harm, not merely imminent endangerment. They note that the court stated that its "'working definition of "imminence" is that there must be a current risk that harm will result in the near future.'" Aplt. Br. at 16. (quoting Bench Ruling at 41). We agree with Plaintiffs that the district court misspoke on this occasion during the hour and a half that it delivered its oral decision from the bench. But the error is immaterial in light of the court's factual findings. The court did not rely on the absence of imminent *harm.* Rather, the basis of its ruling was that there was no evidence that under current conditions at the Denver Airport there would be measurable (much less harmful) levels of hydrogen sulfide in Concourse B. *See* Bench Ruling at 34 (finding that the evidence of current conditions did not establish the presence of dangerous levels of hydrogen sulfide or ADF); *id.* at 42-43 (noting that even assuming that significantly more ADF degraded in the basement of Concourse B, "there is insufficient evidence to demonstrate how much hydrogen sulfide would be produced"

and whether it would "rise to the level of creating a health hazard.").

Plaintiffs also argue that Denver ceased full-plane deicing at the gates only as a result of the present lawsuit and that it is free to renew the practice if they are denied relief. But the district court found that such a change would not be imminent. It said that the prospect of resumption was only speculative and that the evidence did not establish that Denver would resume full-plane deicing upon termination of this litigation. Moreover, the court found that the evidence did not show that even such a resumption would present a substantial health risk.

Finally, Plaintiffs rely on mootness doctrine to support their claim of imminence. They point out that Denver's cessation of full-plane deicing at the gate does not make this case moot, because such deicing may resume. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. . . . The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (brackets, ellipsis, citations, and internal quotation marks omitted)). But mootness doctrine is irrelevant to the RCRA requirements at issue in this case. The district court

did not dismiss the suit on jurisdictional grounds (mootness), but because of Plaintiffs' failure to prove their claim. A RCRA suit cannot be brought because someone may sometime begin disposing of solid waste in a manner that presents an endangerment. The endangering practice – here, the resumption of gate deicing – must be *imminent*. *See* 42 U.S.C. § 6972(a)(1)(B). Plaintiffs' suit was properly dismissed because the evidence showed that resumption of full-plane gate deicing at Concourse B was not imminent, but merely speculative. If the district court had been persuaded by the evidence that Denver would likely resume full-plane deicing at the gates upon conclusion of this litigation and that such a practice may present an imminent and substantial endangerment to health, we presume that it could properly issue an injunction under RCRA. That, however, is not the case we have before us.

III. CONCLUSION

We AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 05-cv-00242-MSK-MEH

TERRI CRANDALL and JOANN HUBBARD,
Plaintiffs,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, d/b/a/ The Denver International Airport, a Colorado political subdivision,

Defendant.

REPORTER'S TRANSCRIPT
(Trial to Court: Bench Ruling)

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, commencing at 9:02:37 a.m., on the 24th day of April, 2008, in Courtroom A901, United States Courthouse, Denver, Colorado.

Proceeding Recorded by Mechanical Stenography,
Transcription Produced via Computer by
Paul Zuckerman, 901 19th Street, Room A259,
Denver, Colorado, 80294, (303) 629-9285

[2] **APPEARANCES**

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* * *

PROCEEDINGS

(In open court at 9:02 a.m.)

THE COURT: Please be seated.

We're convened this morning in Case No. 05-242, which is encaptioned Terri Crandall and JoAnn Hubbard vs. the City and County of Denver. This matter is set down for an oral ruling following a five-day bench trial.

Could I have entries of appearance, please.

MR. GLANTZ: Good morning, your Honor. Perry Glantz. With me is Mr. John Fognani, Fritz Ganz, Brian Gonzales. We're all of the law firm of Fognani & Faught. And Terri Crandall and JoAnn Hubbard are here this morning as well.

THE COURT: Good morning.

MR. MATTISON: Good morning, your Honor. For the City, Chris Mattison, Andy Carafelli, and Peter Moyson of Hall [3] & Evans. Together with me is Helen Raabe with the City Attorney's Office.

THE COURT: Good morning.

THE COURTROOM DEPUTY: Judge, we do have someone available by phone.

THE COURT: All right. Who do we have on the phone?

MR. NEWMAN: It's Dan Newman, your Honor.

THE COURT: Mr. Newman, in what capacity are you appearing?

MR. NEWMAN: I'm an attorney with Excel Environmental. We're the environmental insurance carrier for the City of Denver.

THE COURT: Oh. All right. Thank you. I'm not used to have having anyone other than parties appear by phone or their counsel, so you catch me sort of by surprise.

MR. NEWMAN: I was in attendance for the five-day trial but, I'm in Philadelphia and could not make it out there for today.

THE COURT: Well, we're glad that you can connect by phone. And should you be unable to here at some point, please let me know.

MR. NEWMAN: Thank you.

THE COURT: All right. The Court is prepared today, after considering the evidence and the argument presented at a five-day trial, to issue an

oral ruling in this case. There [4] will be no written opinion, and I anticipate that this oral ruling will take sometime to deliver. So I want to make sure that all of you are (1) comfortable and (2) understand that since it will take some time to deliver this ruling, should you become uncomfortable and you need to walk around or you need to visit the facilities, please feel free to come and go as you choose.

Now, before I begin with the ruling, I want to express the Court's gratitude to Counsel in this case. You've demonstrated a sincere and committed dedication to your clients' cause. You have demonstrated professional collegiality and courtesy in the courtroom, you were extensively prepared for trial, and you efficiently presented evidence at trial in a streamlined fashion, thereby minimizing the costs to your clients.

Parties: You've been well-represented in this case. And I want to tell you both that I have listened carefully to the evidence that's been presented, and I've considered the arguments of your counsel both in writing and orally.

As to the plaintiffs, Ms. Crandall and Ms. Hubbard, I understand that your purpose in bringing this lawsuit is to ensure a healthy environment on Concourse B at DIA. I appreciate the frustration that you felt in making complaints about what you believe to be a noxious odor over a number of years and the fact that for an extensive period of time it [5] appears that your complaints were ignored or rebuffed. I

understand that you believe that the City and County of Denver has not done enough to address your concerns.

As to the City and County of Denver, I understand and appreciate that it, too, is committed to a safe environment on Concourse B at DIA and that it has engaged numerous experts and studies and implemented recommendations to meet that objective. I appreciate that it, too, is frustrated that the plaintiffs are not satisfied.

Unfortunately, this litigation process by its nature does nothing to build upon the parties' common interests, their interest in a safe environment on Concourse B. Instead of bringing the parties together in a common purpose, litigation by its nature divides you. It pits you against each other as opponents, each side trying to win, each side trying to prove that that side is right and the other side is wrong.

And by the nature of the litigation process, the Court's decision is two steps removed from the common purpose that you share. The Court is called upon to evaluate the evidence in the courtroom, that which has been presented during the trial, according to the law. That doesn't involve deciding who is a good guy or a bad guy, it doesn't involve deciding who is right and who is wrong, and it certainly does not serve a common purpose of maintaining good air quality in Concourse B at DIA. What it does is in accordance with the law involve a [6] dispassionate, impartial, rational assessment of the evidence and comparing

that evidence to the legal standards that are applicable under RCRA; and unfortunately, in doing that, it neither affects the air in Concourse B, nor does it decide that one side is right and the other side is wrong. Essentially, there will be no winner in this case.

With regard to the ruling here, as I said, I have considered all of the evidence that's been presented and the very persuasive arguments made by Counsel.

The Court exercises jurisdiction in this case pursuant to 28 U.S.C. Section 1331 because this action involves a single claim brought pursuant to the citizen suit provision of the Resource Conservation and Recovery Act, which is commonly referred to as RCRA. It's found at 42 U.S. Code Section 6972, and the applicable subsection is found at subsection (a)(1)(B). It reads:

"Any person may commence a civil action on his own behalf against any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment."

Under this statute, the Court is authorized, if a claim is proved, to provide equitable relief. Here the plaintiffs request:

[7] That the Court order an independent risk assessment for air contamination at Concourse B at

DIA in accordance with EPA specifications referred to as RAGS A, particularly addressing vapor intrusion into Concourse B;

Secondly, installation of air monitors in the basement of Concourse E *[sic],* particularly in the mechanical sump rooms;

Third, removal of drywall in the basement of Concourse B;

Fourth, installation of a system engineered to prevent the generation or dissemination of off-gasses in the basement of Concourse B.

And finally, a ban of full-plane deicing at the gates of Concourse B.

Now, in order to implement these requests, the plaintiffs have asked that this Court exercise continuing jurisdiction over DIA and particularly Concourse B through the appointment of a special master to ensure conformance with the Court's orders.

This matter has been tried to the Court over five days. The Court has considered all of the arguments, the legal authority, and the evidence; and this ruling will contain factual findings, legal conclusions, and an explanation of my reasoning.

Because RCRA is a specific statute with a narrow [8] purpose, the Court's factual findings appear in two contexts: first some general facts; and then as part of the analysis in this opinion due to the unique nature of this statute and the carefully tailored presentation

of parties, the Court does not intend its factual findings to have preclusive effect under the doctrines of *res judicata* or collateral estoppel.

Mr. Newman, Mr. Zuckerman tells me it's a little hard for him to hear in the courtroom because there are sounds coming from your office. Can you put your phone on mute?

MR. NEWMAN: Yes.

THE COURT: Okay. And that way, we won't hear the background noise in your office. Thank you.

This controversy focuses upon odors emanating from the basement of Concourse B at Denver International Airport. And with regard to that, I'm going to make some general factual findings:

First the odors are described as offensive, smelling like sewage, rotting nightshade, or rotten eggs. The plaintiffs contend that they originate from degrading propylene glycol, which is the substance used to deice planes at DIA. Sometimes the parties referred to this as "propylene glycol," sometimes they referred to it as "ADF," "aircraft deicing fluid"; and I will be referring to it by both terms as well.

The plaintiffs contend that the odors in Concourse B are caused by the degradation of propylene glycol in an [9] anaerobic environment. They contend that either the odors are generated when the propylene glycol degrades in the soil and the gasses

that come from the degradation process then infiltrate the basement at Concourse B, or that the propylene glycol becomes dissolved in storm water that flows down through the cracks of the tarmac into the soil and then into the basement at Concourse B.

The plaintiffs contend that when the propylene glycol degrades in the presence of sulfur or sulfates, it produces hydrogen sulfide gas, produces the gas first in the fluid and then it off-gasses into the air. It is this odor that is characteristically foul-smelling, smelling of sewage or rotten eggs.

The plaintiffs contend that the production of hydrogen sulfide gas can be episodic, depending upon the weather, particularly when there – there is significant precipitation from either rain or snow.

Now, Concourse B is one of several concouses at DIA. DIA is a hub used by United Airlines, and Concourse B is used almost exclusively by United Airlines. United Airlines has approximately 300 flights per day from the concourse. It employs up to 500 customer service agents. On Concourse B are located numerous restaurants, shops, cleaning personnel, security people, and other folks who work there. In addition, there are uncountable travelers that pass through Concourse B.

[10] Concourse B has a number of levels. The lowest level that we are dealing with in this lawsuit is the basement level. It exceeds the footprint of the building, extending out under the tarmac where the

gates are located along the concourse. In the basement level, there are 12 mechanical or sump rooms. The sump – there are two sump systems, sanitary sumps and industrial sumps. The sanitary sumps receive waste from bathrooms and kitchens and drains in the basement floor. The floor drains have traps which prevent sewer gas from coming back out of the drains.

In addition, there is a closed sump system, or at least some of the sumps are included in a closed sump system which is ventilated outside of the concourse.

Above the basement is the apron level. That's the level on which the planes park outside the gates. And above the apron level is the main concourse level. That's the level where the gates and restaurants and shops are located. And above the main concourse level is the mezzanine level. There are shops and lounges and offices and meeting rooms located on the mezzanine level.

We turn next to the chemical breakdown of propylene glycol. Four experts, Dr. Hernandez, Dr. Strauss, Dr. Hewitt, and Dr. Millner, testified concerning the chemical process and products generated when propylene glycol degrades. They're all in agreement. Propylene glycol degrades in two different ways. [11] If it degrades in the presence of oxygen, aerobically, the degradation process produces carbon dioxide and other products. But if the degradation is anaerobic, takes place outside the presence of oxygen, it produces aldehydes, propionic acid, and if sulfate or

sulfur is present, hydrogen sulfide. That is produced first in the fluid and then by operation of physics laws becomes airborne as it particulates into the air.

Although the aldehydes and propionic acid may have potential health effects, the bulk of the evidence presented in this case concerned the effect of hydrogen sulfide; and it is therefore hydrogen sulfide as an off-gassing product from propylene glycol with which the Court is concerned.

The Court notes that the off-gassing of hydrogen sulfide is not unique to propylene glycol. It results from similar anaerobic breakdown of other organic materials as well, such as jet fuel or antifreeze, which is composed primarily of ethylene glycol.

Everyone agrees that hydrogen sulfide has a characteristic smell like sewage, sewer gas, or rotten eggs. Dr. Strauss and Dr. Hewitt agree that hydrogen sulfide has what is as a, quote, "huge threshold range," unquote. It can be detected by smell at very low concentrations in the air, much lower than those which cause health effects. For example, some people with sensitive noses can detect hydrogen sulfide in the air at 1 part per billion. It is recognized as [12] a distinct odor by almost all people at 300 parts per billion, or 300 times that amount.

Health effects, however, require much higher concentrations. Eye irritation has been noted at between 5 and 30 parts per million – not billion. Marked eye and lung irritation occurs at 200 parts

per million. Breathing impairment and unconsciousness results at 1,000 parts per million. In other words, there must be more than 10 times the amount of hydrogen sulfide in the air once everyone can smell it before there is any adverse effect on anyone's health.

The recognized health impacts are burning eyes and lung irritation and, at very high concentrations, breathing impairment and unconsciousness. Some people who smell the rotten-egg smell at Concourse B complained of sore throats, sinus congestion and infection, pneumonia, and nausea. Some believed that their symptoms were related to the odor, but no medical evidence was presented that correlated any symptom suffered by any complaining person to the presence of hydrogen sulfide.

Now, this lawsuit has been pending since 2005; and in considering the evidence and the standards required by the law, it's helpful to look at the evidence in two different time periods. The first time period reaches into early 2006, and the second time period follows thereafter.

We look at these two time periods because the [13] conditions and the evidence as to the two time periods is distinctly different. Prior to 2006, there were numerous complaints of sewer gas and rotten-egg odors.

In formulating her qualitative assessment, Dr. Harlee Strauss reviewed 30 depositions, mostly of United Airline customer service agents working on

Concourse B. There were particularly malodorous locations and particularly malodorous incidents. For example, there were numerous complaints that came from the Red Carpet Room located adjacent to elevator shafts in 2001. Other odor complaints came from ramp personnel and airport employees. Almost all the complaints referred to the rotten-egg smell. Some complaints also linked the smell to degrading deicing fluid.

There are complaints in 1997. And one witness testified that the numerous complaints resulted in a collective grievance that was filed prior to the initiation of this lawsuit. That grievance reflected only a portion of the complaints that had been made by United Airlines' employees and those who worked on Concourse B.

Karen Rewolinski testified as to foul-smelling odors on Concourse B. She said she was seriously sick in 2005 but has not been sick since then.

And the plaintiff Terri Crandall testified that the odors were particularly pungent i 2002 through 2005. She has not lodged a complaint since 2006.

[14] In addition to these numerous complaints, there is objective evidence of the presence of propylene glycol in Concourse B and of the presence of hydrogen sulfide in Concourse B.

In rendering her qualitative assessment, Dr. Harlee Strauss reviewed a number of documents: a report issued in 1996 referred to as the "Aguirre

Report," which found a water leakage problem into the basement of Concourse B; a 1998 CDM report which included its water quality study and recommended a number of actions to control the runoff of ADF into DIA's storm water system.

In the late 1990's, Dr. Hernandez participated in a study that searched for fugitive emissions of ADF. This was conducted by Camp Dresser & McKee, but there were no local calculations pertinent solely to Concourse B.

In 2001, there was an incident in the Red Carpet Room on Concourse B in which numerous people complained of odor and burning eyes. Air testing found concentrations of hydrogen sulfide above 1 part per million.

A report prepared by U.S. Corporation concluded that the foul odors initiating the complaints were the result of off-gassing of degrading deicing fluid but that the concentrations of the hydrogen sulfide at 1 part per million were below occupational exposure limits.

There is also a report prepared by Tri-County Health [15] Department in August 2001 regarding tracer gas which tracer gas coming into the Red Carpet Room through elevator shafts.

In an email in 2004, Janell Barrilleaux, the Director of Environmental Programs at DIA, acknowledged that water at the east end of Concourse B had an odor and had breakdown or what we call

"daughter" products from the breakdown of propylene glycol.

An investigation into Concourse B odor by CDM in 2005 was conducted. Air samples were retrieved, but hydrogen sulfide gas was not detected. The study revealed small amounts of aldehydes associated with glycol degradation and incomplete combustion of other substances.

In April of 2006, Dr. Hernandez inspected the basement of Concourse B. He observed water stains on walls, floors, degraded drywall, corroded metal from past exposure to chemical fumes and liquids. He observed bubbling in some of the sumps, and he detected fumes coming from the sumps. He sampled the water. He did not find propylene glycol; however, he did find some ethylene glycol, but he took no air samples.

And in September, 2005, Exhibit 160, there are log entries and work orders regarding hydrogen sulfide detected in a mechanical room in the basement below Concourse B.

That's our first time period.

In 2001, DIA began a sealing program of the tarmac located around Concourse B. That sealing program has continued [16] to date. It's subsequent to the Red Carpet incident. It sealed off the elevator shafts adjacent to the Red Carpet Room.

In 2005, full-gate deicing ceased. It's now limited to gear deicing and what is called "frosty" deicing at

the gates. In 2006, ventilation fans were installed in two of 12 basement sump rooms, and the City anticipates installing the fans in the remaining sump rooms.

That then takes us to the conditions since 2006.

In contrast to the earlier period, there are significantly fewer odor complaints and no objective evidence of hydrogen sulfide in the air in Concourse B.

As I said, Karen Rewolinski testified to foul smelling odors at various times and places on Concourse B. Most recently, she said she smelled it in early 2008; but the last time she got seriously sick was in 2005.

Terri Crandall also testified that she smelled a variety of odors in Concourse B: stale, moldy, musty, sewage, gassy, rotten-egg smell. It's worse after a heavy snowstorm or in the spring or summer rainfall. She reports it only when it's substantial. The last severe instance she reported was in the Mildred Harris training room. That occurred in 2005 or early 2006.

Dr. Hernandez has visited DIA three times in conjunction with this matter. Most recently he visited in March of 2008. He previously in his visit in 2006 saw the [17] conditions in the basement which reflected water coming into the basement, stains on the floor, bubbling in the sumps. He testified that based on his visit in March of 2008, conditions were similar to what he had previously seen. He smelled a

rotten-egg smell and what he characterized as rotting nightshades, and after his inspection he felt ill. He sought medical treatment, but he did not obtain a diagnosis correlating his illness with his exposure at DIA. And what is most persuasive to this court is, given his expertise in sanitary engineering, he expressly stated that he could not correlate his illness to the sumps.

In March of 2008, a number of other folks inspected the mechanical rooms where there were vent fans; and the testimony was there was a mild human waste smell associated with the sanitary sump.

Mr. Larson also testified with regard to the conditions in the basement. Don Larson testified that there is continuing water leakage into the basement especially when there is heavy rain and snow. He smelled degrading glycol in the basement. He said it's worse when it rains, and there is an occasional sewer smell. He recognized the degrading glycol smell from his many years working on the ramps of airports, and he testified as to a leak in a pipe that transports deicing fluid outside of gate B17 – I'm sorry – B16.

Now, contrary to our earlier time period, there is no [18] objective *indicia* of the presence of hydrogen sulfide gas in the air in Concourse B.

CTEH was retained by the City in 2005 to conduct air testing throughout the concourse. It conducted testing in November, 2005, April, 2006; November, 2006; February, 2008, and March, 2008. It

conducted three types of sampling: stationary sampling, personnel sampling, and real-time sampling. Stationary sampling involves setting up monitors in the mechanical sump rooms. Personnel sampling included following personnel around on their duties and testing the air that they encountered. And real-time sampling included going to various places in the concourse and obtaining samples.

There were 60 or more locations sampled, and no hydrogen sulfide gas was detected in any sample. Low levels of aldehydes were detected, methane was detected; but these were consistent with the background outside Concourse B, and they were not in excess of occupational standards.

So we turn, then, to the legal standard that applies here. The plaintiffs assert a claim, as I've identified, under 42 U.S.C. Section 6972(a)(1)(B). The plaintiffs contend that DIA has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of a solid or hazardous waste which may present an imminent or substantial danger to health or the environment.

Unlike other environmental statutes, RCRA is not [19] principally concerned with ensuring the cleanup of environmental hazards or the compensation of those who have been forced to undertake cleanup. Rather, RCRA's primary purpose is to, quote, "insure the proper treatment, storage, and disposal of waste so as to minimize the present and future threat to human health and the environment," unquote.

That quotation comes from the United States Supreme Court decision in *Meghrig vs. KFC Western*, found at 516 U.S. 479. Indeed, under RCRA, the equitable relief that can be granted is limited to that which is necessary to prevent imminent and substantial harm.

The statute specifies three elements that must be proven to establish a claim: that the defendant is a person who is a generator or transporter of solid waste or one on is or was an owner of a solid waste treatment waste, storage, or disposal facility; (2) that the defendant contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid waste, and (3) that the waste may present an imminent and substantial endangerment to health or the environment.

Now, the leading case in the Tenth Circuit – Colorado is in the Tenth Circuit – *is Burlington Northern and Santa Fe Railroad Company vs. Grant.* It's found at 505 F.3d 1013. It's a Tenth Circuit, 2007 case. And I will be referring to it in a number of different capacities as I work through these [20] elements. It cites to *Cox vs. City of Dallas,* 256 F.3d 281, a Fifth Circuit, 2001 decision, for the three elements that must be proved.

We start with the first element, a person generating or transporting solid waste. It does not appear that the parties dispute that the defendant City and County of Denver is a person for purposes of RCRA; however, the definition of "solid waste" is

something that the Court must explore. It is statutorily defined as "any garbage, refuse, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial and commercial operations." That definition is found in 42 U.S.C. Section 6903(27). The parties have identified the solid waste in this matter as propylene glycol or ADF; and although it sounds oxymoronic, the statute expressly contemplates that liquids such as propylene glycol qualify as solid wastes.

Now, although the solid waste in this case is propylene glycol and the parties agree to that, there is a dispute as to whether propylene glycol as a solid waste is subject to RCRA, and that is because there is another body of law that applies to liquids that flow into navigable waters. In brief, RCRA regulates the improper disposal of solid waste, a term which admittedly includes deicing fluid. However, RCRA's definition of "solid waste" excludes industrial discharges which are point sources subject to permits under the [21] Clean Water Act.

The Clean Water Act, found at 33 U.S.C. Section 1251, and other sections provides a system by which certain regulatory bodies may issue permits governing a facility's permissible discharge of pollutants into navigable waters. The focus of regulation under the Clean Water Act is on point sources of contamination. Generally speaking, a point source encompasses any artificial system for moving water, waste, or other materials from a location where

pollutants originate to their eventual disposal into navigable waters.

The defendant explains that Concourse B has a complex system designed to catch fluid containing storm water that flows or seeps into the building, channeling that storm water into the airport's general storm water collection system, where it is ultimately discharged into navigable waters. Thus, the defendant contends that the entirety of the process is within the design of the storm water collection system and therefore any off-gassing from propylene glycol that gets into the basement that goes into the sumps is subject to a permit issued by the State of Colorado under the Clean Water Act's permitting process. As such, it would be exempt from RCRA.

The plaintiffs do not appear to disagree with the general premise that the spilled fluid actually enters into a collection system and that would constitute a point source regulated under the Clean water Act instead of RCRA, but the [22] plaintiffs contend that to the extent the fluid breaks down and releases harmful vapors as to moves through the collection system, those vapors escape the collection system and are subject to RCRA. Once escaped, the vapors are no longer subject to regulation under the Clean Water Act; instead, they're regulated by RCRA.

Thus, the legal question is whether the point source exclusion under RCRA applies to solid wastes

that enter a collection system that is – that ultimately discharges in a point source but escape the system prior to discharge.

This issue was raised prior to trial, but the Court reserved ruling pending the presentation of evidence. That is because the cases cited by the parties and the Court's own research led to the conclusion that the Court had to consider evidence as to what the permitting authority intended to cover in the permits.

The Court was most persuaded in its analysis by a Fourth Circuit decision, *Piney Run Preservation Association vs. County Commissioners of Carroll County,* found at 268 F.3d 255. In this decision, the Fourth Circuit considered whether the Clean Water Act's permit shield – that is, protection against pollution suits enjoyed by the holder of the permit issued under the Act's regulatory scheme – extended to the discharge of pollutants that were not expressly contemplated by the permit. In that case, a permit holder was entitled to [23] discharge effluents into a stream, but the plaintiffs alleged that the discharge of heated effluents or hot fluid exceeded the scope of the permit. In considering the question, the court explained the rationale of the permit process as follows:

"The applicant discloses the nature of its effluent discharges to the permitting authority. The permitting authority analyzes the environmental risk posed by the discharge and places limits on those pollutants that, in the words of the Second Circuit and EPA it,

'reasonably anticipates' could damage the environmental integrity of the affected waterway. Thus, as long as the permit holder complies with the Clean Water Act's reporting and disclosure requirements, it may discharge pollutants not expressly mentioned in the permit. The only other limitation on the permit holder's ability to discharge such pollutants is that the discharges must be reasonably anticipated by or within the reasonable contemplation of the permitting authority. Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process, whether spills or otherwise, do not come within the protection of the permit shield."

This reasoning is applicable here, because the City [24] contends that the permits govern the entire degradation process and the hydrogen sulfide that results from the degradation of the propylene glycol. What the Court reserved determination on is whether the permitting authority reasonably anticipated that it would be covering off-gassing hydrogen sulfide of the degradation of propylene glycol in Concourse B.

At trial, two permits are presented: DIA's industrial storm water permit issued by the Colorado Department of Public Health at Exhibit 163 and the Metro Wastewater Reclamation District permit at Exhibit 164, issued to the City and County of Denver and monitored by the Metro District. Both permits

regulate discharge of aircraft deicing fluid into storm water and the sanitary system from DIA. Both appear to appear to address off-gassing from glycol degradation. Indeed, odors associated with off-gassing outside DIA buildings have been the subject of investigation and monitoring by the permitting authorities. There is no dispute that some water that seeps into Concourse B ends up in sanitary sumps which empty into the sewer system subject to the jurisdiction of Metro Wastewater.

Propylene glycol leaks, storage, and cleanup outside of Concourse B are arguably subject to the permits; however, the question is whether off-gassing from fluids inside Concourse B are subject to the permits.

The Court concludes that where the propylene glycol leaks, storage, cleanup, and out-gassing occur outside of the [25] DIA buildings, they are not subject to RCRA. This means that any vapors that are created in the soil outside of DIA are not subject to RCRA, even though they may enter into DIA through cracks in the basement.

In reaching in conclusion, the Court turns to a number of different references in the permits and the storm water management plan. Metro Wastewater's requirements include at requirement No. 11 – and for the record this is Exhibit 164 with Bates stamp DIA 043406 – "any wastes that contain a corrosive, noxious, or malodorous material or substance which

either singly or by reaction with other wastes is capable of causing damage to the system or to any part thereof, creating a public nuisance or hazard or of preventing entry into the sewers for maintenance and repair."

In the storm water management plan found at 165, Section 2, with a page number of DIA Bates stamp 059321, the permit is quoted as saying, "The plan shall identify potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the plan shall describe and ensure the implementation of practices which are to be used to reduce the pollutants in storm water discharges associated with industrial activity at the facility and to assure compliance with the terms and conditions of the permit."

[26] And among the critical tasks that are identified in conjunction with the storm water plan found at Exhibit 165, pages marked DIA Bates stamp 059464 and '465, are an obligation at C4 that the airport "capture storm water containing spent ADF generated within deicing areas when aircraft deicing occurs" and to collect storm water from non-deicing areas, fugitive areas, when spent ADF is likely to be present.

Now, the context of these permits is such that the permitting authorities are concerned with propylene glycol or other substances getting into the storm water system, and presumably propylene glycol

which leaks down among cracks in the tarmac into the soil could go a variety of different directions. It could wash into the storm system; or it could, as the plaintiffs contend, vaporize as part of a degradation process and the fumes could come into the basement, or it could be washed into the basement with storm water that comes in through the ceiling or the walls.

The Court has heard the testimony of Janet *[sic]* Barrilleaux, who is DIA's representative with regard to environmental matters generally and these permits specifically. She testified that she has no responsibility for monitoring what happens inside the concourse and that is handled by the DIA Risk Management and Health and Safety Office and they have no responsibility to ensure compliance with these permits. The permitting authorities have known about the indoor air [27] complaints in Concourse B but have not attempted to exercise any control over fugitive of ADF in order to address them.

And there was no testimony presented by any representative of the permitting authorities as to their perception or understanding of the scope of the permits.

Therefore, the Court concludes that fugitive propylene glycol or ADF that remains outside of Concourse B is subject to the permits, and that includes off-gassing that occurs outside of Concourse B, but that propylene glycol that flows in storm water into concourse B and degrades in Concourse B is not subject to the permits and instead is subject to RCRA.

Now, put in very simplistic terms, what this means is that leaks from pipes outside the building and vapor that is created outside the building would be subject to the permits; off-gassing that occurs from propylene glycol inside the building is subject to RCRA.

The next term is "contributing to." A person "contributes to" the handling, storage, treatment, transportation, or disposal of solid waste when that person "has a part or share in producing an effect. "Disposal" of wastes includes, "dumping, spilling, leaking, or placing of any solid waste into or on any land or water. And a person who has the ability to instruct or control the actions of another person who is disposing of waste can be found to be "contributing to" any improper handling of such waste. There [28] does not appear to be any dispute between the parties that the City contributes to the handling, storage, treatment, transportation, etc. of deicing fluid or ADF.

This then takes us to the third element that must be proved. The language is "may present an imminent and substantial endangerment." This is the most complex element of the claim. It has several discrete requirements. And some parsing of the phrase is necessary to understand it. And used in the statute, the subject of this phrase is "waste." The predicate verb is "present," and the direct object is "endangerment." In other words, the waste must present endangerment.

In addition, the word "may" is an adverb which modifies the word "present," and "imminent" and "substantial" are adjectives that modify the noun "endangerment." And I'm only glad that someone taught me grammar a long time ago so that I knew the parts of speech so I could understand what the statute was saying.

Understanding how each of these parts of speech fit together is essential to understanding the meaning of this legal provision. We start with the verb and the adverb, "may present." The Tenth Circuit has recognized that this verb clause is expansive language. They describe it as such in *Burlington Northern and Santa Fe Railroad Company vs. Grant,* 505 F.3d 1013, Tenth Circuit, 2007 decision. By affording [29] relief not only where waste actually presents sufficient endangerment but also where it may do so, RCRA confers upon the court, quote, "the authority to eliminate a risk to human health or to the environment posed by the waste."

Here the plaintiffs have not alleged that the ADF or the propylene glycol poses any particular hazard to the environment in its liquid form. They focus upon what happens when it degrades in the anaerobic environment in the presence of sulfur because that causes the off-gassing of hydrogen sulfide gas. Accordingly, the Court limits its analysis to the hydrogen sulfide gas and the propylene glycol that produces it and based upon the Court's reasoning with regard to the permits limits its analysis to the propylene glycol

that flows into the basement and the gas that is produced therefrom.

We turn to the next term, "endangerment." Because the terms "imminent" and "substantial" are adjectives modifying the word "endangerment," the Court must ascertain the meaning of the word "endangerment." In *Grant,* the court explained that "'endangerment' has been interpreted by the courts to mean a threatened or potential harm," here to human health. In other words, proof of an actual present harm is not necessary. Endangerment is a risk of harm. Endangerment exists whenever a solid waste poses, quote, "any risk," unquote, to human health. That's in accordance with *Maine People's Alliance vs. Mallinckrodt,* M-A-L-L-I-N-C-K-R-O-D-T, *Inc.* 471 F.3d 277, a [30] 2006 decision.

The evidence in this case is that the hazard to human health is the hydrogen sulfide gas, which is a daughter product from the anaerobic breakdown of propylene glycol. The evidence presented as to the health effects here, I have already summarized.

The difficulty in evaluating the hydrogen sulfide here is twofold: First of all, hydrogen sulfide gas can be produced by the breakdown of any organic compound, including many used at DIA: fuel; antifreeze, which includes ethylene glycol, and others. And therefore, the smell of hydrogen sulfide gas does not does not establish the presence of propylene glycol.

Secondly, as the experts all recognize, there is a huge odor threshold range for hydrogen sulfide gas. It

presents as an offensive odor in extremely small concentrations; but it does not endanger health unless it is concentrated in significantly higher amounts. As a consequence, subjective recognition of the characteristic rotten-egg odor identifies the presence of hydrogen sulfide gas, but it does not establish that there is any danger to human health. Put really simply, we all can smell it before it can hurt us.

This is where the difference between the two time periods becomes important. Up through early 2006, there were numerous odor complaints, but there was also objective *indicia* [31] of both propylene glycol and hydrogen sulfide inside of Concourse B. But after ameliorative steps were taken by the City, beginning with the sealing of the cracks in 2001, and continuing through the installation of fans in 2006, the conditions changed. There were a few subjective complaints of odor but not the numbers of complaints as in the prior time period. And there was no objective evidence of either propylene glycol or hydrogen sulfide being present Concourse B. CTEH's testimony – I'm sorry – testing of the air quality on numerous occasions and locations failed to record sufficient hydrogen sulfide to constitute any health hazard. Thus, the evidence of current conditions shows neither the presence of propylene glycol nor the presence of hydrogen sulfide in sufficient amounts to endanger human health. The risk is largely theoretical.

The Court is tempted to end its analysis here; but because RCRA is intended to address "any risk," we

will proceed to consider whether the theoretical risk might nevertheless be substantial and imminent.

So we turn to the word "substantial." It is not enough for a RCRA plaintiff to simply show that a particular solid waste poses some endangerment to the health or the environment – to health or the environment. The statute requires that the endangerment be substantial.

Courts have equated the term "substantial" with [32] "serious"; that is, a plaintiff must show that the risk to health is a serious one. It is not necessary that the plaintiffs specifically quantify the nature of the endangerment; in other words, by establishing, quote, "a certain number of persons will be exposed or that a water supply will be contaminated to a specific degree," unquote. And that quotation comes from *U.S. vs. Union Corporation* 259 F.Supp.2d 356, a decision rendered from the Eastern District of Pennsylvania in 2003, quoting *Interfaith Community Organization vs. Honeywell* at 399 F.3d 248, a Third Circuit decision. This is also the underlying thread in *Grant* found at 505 F.2d 1021, where quantification of the level of endangerment is not necessary.

At the same time, the Court does not read cases like *Grant* or *Interfaith Community Organization* for the proposition that relief is warranted to ameliorate any conceivable risk posed by the waste. The definition of "endangerment" already encompasses "any risk" of harm; and if Congress used an adjective such as "substantial" to modify "endangerment," the Court

understands that it must be something more than just an endangerment; it must be a serious endangerment. To interpret the statute otherwise would be to read "substantial" right out of the statutory language.

In this case, all the experts acknowledge that propylene glycol can produce hydrogen sulfide as a byproduct of [33] an anaerobic degradation if there is sulfur present. It is also undisputed that excess propylene glycol washes into the soils and that storm water from snow or rain flushes through the soil, carrying substances in it into the basement at Concourse B. However, the evidence as to current conditions, those since 2006, do not show any significant amounts of propylene glycol in the basement of Concourse B, and similarly they do not show any significant amounts of hydrogen sulfide gas.

In testing the sumps in 2006, Dr. Hernandez did not find any evidence of propylene glycol; he did, however, detect ethylene glycol or antifreeze. His 2006 pictures demonstrate water in the basement, corrosion, and salt deposits. They evidence degradation of something but not necessarily degradation of propylene glycol.

Moreover and more importantly, his testimony as to the condition of the basement when he saw it in 2008 was the same as what he saw in 2006, no better but no worse.

Thus, there is insufficient evidence to establish propylene glycol in any significant amount in Concourse B under the current conditions.

We turn then to hydrogen sulfide gas. All the experts agree that it can result from the degradation of propylene glycol or other substances and that in sufficient concentrations thousands of times greater than when the nose [34] can detect it it can be harmful to health. But the only current evidence as to the presence of hydrogen sulfide are subjective complaints: Ms. Crandall, Ms. Rewolinski, Mr. Larson, and Dr. Hernandez.

The Court does not deprecate those opinions or perceptions at all. The Court recognizes pursuant to the scientific testimony that hydrogen sulfide can be smelled at very low levels before it causes any health hazard.

As I noted earlier, Dr. Hernandez's testimony was particularly persuasive to the Court because he's an expert in wastewater treatment. And although he felt ill this year after visiting the mechanical rooms in the basement of Concourse B, he could not correlate his illness to the water that he smelled or the smell that he experienced in those basement rooms.

Thus, the evidence does not establish levels of either propylene glycol or hydrogen sulfide that are dangerous to human health; and therefore, the Court cannot find that there is a substantial endangerment to human health.

We turn next to the question of imminence. The final requirement is that the plaintiffs show that the endangerment is imminent. Courts have offered a wide variety of definitions for "imminent," and I must admit that this court has struggled with that definition. Like all other definitions that I've applied thus far, I started with *Grant* because it's the only published Tenth Circuit decision that discusses "imminent" as [35] an element in any detail. Unfortunately, its discussion is limited to four sentences, three which of are quotations from other decisions. It refers to *Meghrig,* United States Supreme Court decision in 1996, for the proposition that, quote, "an endangerment can only be imminent if it threatens to occur immediately," unquote. It refers to *Meghrig* for the proposition that imminence does not require a showing of actual harm that will occur immediately so long as there is a risk of threatened harm.

It refers to *Davis vs. Sun Oil Company,* found at 148 F.3d 606, a Sixth Circuit, 1998 decision, which in turn quotes a Second Circuit decision from 1991, *Dague vs. City of Burlington,* found at 935 F.3d 1343, for the proposition that, quote, "an imminent hazard may be declared at any point in a chain of events which may ultimately result in harm to the public," unquote.

And it refers to *Price vs. United States Navy,* 39 F.3d 1011, a Ninth Circuit, 1994 decision, for the proposition that "imminence refers to the nature of the threat rather than the identification of the time when the endangerment actually arose."

A review of the provenance of each of these quotations reveals them to be *dicta* in the cases to which the court cites and in some contexts properly understood only in the factual context of the original case.

[36] In *Meghrig*, the Supreme Court considered the question of whether RCRA permitted as a remedy an award of damages for past cleanup costs. The court's quotations concerning the imminent element arise only as part of the court's rationale for concluding that RCRA is not a remedial scheme; it is strictly forward-looking. It explained that requiring proof of an imminent hazard shows that RCRA "was designed to provide a remedy that ameliorates present or obviates the risk of future harms." And therefore it's not really helpful here.

The "chain of events" quotation that traces its origins back to *Dague* is even more problematic. In *Dague*, the property owners brought a RCRA action against the operator of an adjacent landfill. After a bench trial, the trial court found that the landfill may have presented an imminent and substantial endangerment to health or the environment and the landfill owner appealed. In discussing RCRA generally, the Second Circuit explained that it's not specifically limited to emergency-type situations and therefore imminence doesn't pertain to an emergency. A finding of imminence does not require a showing that actual harm will occur immediately, so long as the risk of harm is present. The court added that "an imminent hazard may be declared at any point in a chain of

events which may ultimately result in harm to the public," and then it cited to a number of decisions.

For this last proposition it cited to *United States* [37] *vs. Ottati & Goss Inc,* found at 630 F.Supp. 1361, a New Hampshire decision in 1985. There, the court had drawn the definition of RCRA's imminent element from *Environmental Defense Fund Inc. vs. Environmental Protection Agency,* 465 F.2d 528, a D.C. Circuit decision in 1972. And what's important about this is it was a non-RCRA case. So the language of "chain of events" which is applied here in RCRA originated in a non-RCRA case. Indeed, that case concerned a petition for the EPA to cancel any registered uses of certain insecticides that allegedly posed an imminent hazard to the public. And what is even more confusing is that the "chain of events" language was not something that came out of a statute or legislative history or other case law but rather it was an assertion contained in the EPA's statement of reasons for its suspension of the pesticide's registration. So the "chain of events" language has little correlation to RCRA.

Finally, the statement in *Grant* that "imminent" refers to the nature of the threat rather than the identification of the time when the endangerment actually arose comes from *U.S. Navy,* but that case in turn refers to *U.S. vs. Price,* 688 F.2d 204, a Third Circuit, 1982 decision. In *Price,* the defendant purchased a landfill that was permitted to receive only nonchemical wastes but over a number of years had accepted large amounts of hazardous chemical

wastes. Water samples drawn from around the landfill shortly after the purchase [38] revealed contaminants in quantities that were likely to create hazards to human health. Evidence further revealed that the contaminants were forming a plume that was heading toward an aquifer that supplied drinking water to a number of public and private wells. And on a preliminary injunction request, the trial court found that the plaintiff had adequately shown the existence of an imminent and substantial endangerment; but it refused to grant certain relief sought by the plaintiff; namely, extensive testing of the potential hazard and the requirement that the plaintiff *[sic]* secure alternative water supplies for the potentially affected parties. The plaintiff appealed.

In discussing the availability of relief under RCRA, the Third Circuit prefaced its analysis by briefly quoting the expansive language of RCRA and that it was intended to confer overriding authority to respond to situations involving a substantial endangerment to health or the environment. The Court quoted a portion of a congressional report accompanying the passage of RCRA which stated in part, quote, "'imminence' in this section applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment," unquote.

[39] The Third Circuit went on to note that the statute permits the court to authorize clean up of the cite, even a dormant one, if that action is necessary to abate a present threat to the public health or the environment.

Viewed in the factual context in which the Third Circuit adopted the "imminence applies the nature of the threat" language from the congressional report, it's clear that the "nature of the threat" language is intended to convey the point that RCRA may be used to abate a threat of harm even though the conduct that created that threat occurred long ago and has long since ceased.

None of these definitions are helpful to determining imminence in this case; and therefore, the Court turns to case law other than *Grant.*

In particular, the Court turns to an unpublished decision in the Tenth Circuit, *Chemical Weapons Working Group Inc. vs. United States Department of Defense.* It's found at 61 Fed.Appx. 556. It's a Tenth Circuit, 2003 decision. Because it's an unpublished decision, it has no precedential effect. That means it doesn't bind this court. But its reasoning is instructive in understanding what "imminence" means. In *Chemical Weapons,* the Tenth Circuit affirmed a trial court's ruling following a bench trial. The trial court found that no RCRA claim had been proven by the plaintiffs, who failed to show that commencement of operations of a weapons disposal site [40] posed an imminent risk of harm to the public. The facility had

conducted two trial burns of dummy weapons so as to assess the possibilities of toxic emissions and had been satisfied that no such emissions occurred and thereafter had begun test burns involving live weapons. The trial court found that the plaintiffs had failed to show an imminent hazard under RCRA because no agent-related injuries had been sustained and no agent had been released into the environment. The plaintiffs appealed, arguing in part that the trial court had unduly focused on past events and had not adequately considered whether there was an imminent danger likely to exist in the future.

The Tenth Circuit rejected the argument that the trial court's language suggested that it had not considered the possibility of future events. Then it turned to the "imminent" element. It observed that, quote, "Although the statute implies future orientation, that orientation cannot be very far into the future," unquote. It cited *Meghrig* for the proposition that, quote, "Imminent harm by definition will occur almost immediately if action is not taken to prevent it," unquote. It explained that, quote, "A vague possibility of future harm cannot satisfy the statute," unquote, and that a, quote, "open-ended allegation," unquote, by the plaintiffs that they, quote, "expected that such incidents will continue to occur," unquote, simply does not satisfy the standards of RCRA.

[41] Again relying on *Meghrig,* the court pointed out that, quote, "An endangerment can only be imminent if it threatens to occur immediately, which implies that there must be a threat which is present

now, although the impact of that threat may not be felt until later," unquote.

Following this guidance, which the Court finds instructive in the context of the facts here, the Court believes that the working definition of "imminence" is that there must be a current risk that harm will result in the near future. Here the risk that propylene glycol will produce hydrogen sulfide sufficient to cause a health hazard is a theoretical risk. Evidence of current conditions do not demonstrate either a substantial concentration of propylene glycol or a substantial concentration of hydrogen sulfide.

But the plaintiffs argue that the risk exists now and it may cause a future harm if United Airlines resumes full-gate deicing at Concourse B rather than using deicing pads located away from the concourse. It points to correspondence that suggests that this lawsuit was the triggering event that caused full-gate deicing to cease; and therefore, the plaintiffs reason that United will resume full-gate deicing once this lawsuit is over and that that will cause an increased health risk.

The Court finds the evidence with regard to this too speculative to support the conclusion. First, although the [42] plaintiffs focus on the effect of this litigation on the decision to stop full-gate deicing, other evidence presented suggests that there were economic factors in play as well. These include the construction of new deicing pads away from Concourse B, greater capability in using the pads to

deice, the impact of pad deicing on the speed and number of planes to be serviced, and a requirement of precedent testing, presumably environmental testing, as to the effect of deicing fluid, which United has been unwilling to perform.

In addition, resumption of full-gate deicing does not *ipso facto* increase the likelihood of a substantial health risk. As noted throughout this opinion, the evidence establishing that propylene glycol is the only or major source of hydrogen sulfide gas in Concourse B is weak. The hydrogen sulfide gas may be caused by the degradation of a number of organic compounds, including propylene glycol. And in addition, we have another impending event in the future, and that is the installation of fans in the remaining mechanical rooms located in the basement of Concourse B.

The Court is without evidence to balance the effect of future full-gate deicing against the effect of future fans. And therefore, the Court cannot conclude that the evidence is substantial enough to stand on its own. Instead, it requires the Court to speculate as to what might happen in the future.

In addition, assuming that there is an increase in [43] significantly more propylene glycol released at the gates, not cleaned up, flowing into the basement, degrading in the basement, there is insufficient evidence to demonstrate how much hydrogen sulfide

would be produced. And without a significant concentration, it might be foul smelling, but it might not rise to the level of creating a health hazard.

Thus, as to the question of whether the alleged endangerment is imminent, the Court concludes the evidence is inadequate to reach such conclusion without impermissible speculation.

In summary, the Court finds that a potential endangerment exists but that it is neither substantial nor imminent. And as a consequence, the request of the plaintiffs for injunctive relief must be denied. Judgment is entered in favor of the defendant, the City and County of Denver in this action. The clerk will be directed to close this case.

Let me inquire of Counsel whether you have any need for clarification or further explanation?

MR. GLANTZ: No, your Honor.

MR. MATTISON: No, your Honor.

THE COURT: Then thank you again for your presentation in this matter. That will conclude this case. We'll stand in recess.

(Recess at 10:35 a.m.)

* * *

[44] REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 29th day of April, 2008.

/s/ Paul A. Zuckerman
Paul A. Zuckerman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 05-cv-00242-MSK-MEH

TERRI CRANDALL and
JOANN HUBBARD,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER,
COLORADO, d/b/a The Denver International Airport,
a Colorado political subdivision,

Defendant.

JUDGMENT

(Filed Apr. 24, 2008)

PURSUANT TO the Court's oral findings of fact and conclusions of law, rendered on April 24, 2008, and the proceedings to date, judgment is hereby entered in favor of Defendant, City and County of Denver, and against the Plaintiffs, Terri Crandall and Joann Hubbard, on the claims in this case, with costs pursuant to Fed. R. Civ. P. 54(d)(1).

Dated this 24th day of April, 2008

BY THE COURT:

/s/ Marcia S. Krieger
Marcia S. Krieger
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TERRI CRANDALL, et al.,

Plaintiffs – Appellants,

v.

CITY AND COUNTY OF DENVER, Colorado, d/b/a The Denver International Airport, a Colorado political subdivision,

Defendant – Appellee.

No. 08-1197

ORDER

(Filed Apr. 13, 2010)

Before **HARTZ, HOLLOWAY,** and **TYMKOVICH,** Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elizabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

42 U.S.C.A. § 6972. Citizen suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under *section 6928(a)* and *(g)* of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section –

(A) prior to 60 days after the plaintiff has given notice of the violation to –

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to –

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

> **(i)** has commenced and is diligently prosecuting an action under *section 6973* of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 U.S.C.A. § 9606*], [*FN1*]
>
> **(ii)** is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 U.S.C.A. § 9604*];
>
> **(iii)** has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 U.S.C.A. § 9604*] and is diligently proceeding with a remedial action under that Act [*42 U.S.C.A. § 9601 et seq.*]; or
>
> **(iv)** has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [*FN2*] [*42 U.S.C.A. § 9606*] or *section 6973* of this title pursuant to which a

responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment –

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 U.S.C.A. § 9604*]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [*42 U.S.C.A. § 9604*] and is diligently proceeding with a remedial action under that Act [*42 U.S.C.A. § 9601 et seq.*].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a

State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter

may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or *section 6976* of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection

(a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

Crandall v. Denver
Case No. 05-cv-00242-MSK-MEH

TRIAL EXHIBIT
53

Barrilleaux, Janell – DIA

From: West, Turner – DIA

Sent: Thursday, January 15, 2004 3:11 PM

To: 'bob.sturez@ual.com'; 'tom.lisi@ual.com'; 'russ.richardson@ual.com'; 'Dallas.Belt@ual.com'

Cc: Braunagal, Vicki – DIA; Barrilleaux, Janell – DIA; Dykstra, Arlene V. – DIA; West, Turner – DIA

Subject: UAL Gate Deicing Program

Based on our meeting Wednesday 1/14/04, the Airport Environmental and Engineering Groups will do all possible to facilitate UAL gate deicing. As I indicated in our meeting, the UAL Legal Department and Airport Legal Department must resolve issues concerning employee claims/lawsuits prior to proceeding with a test or permanent gate deice program.

Please advise if we can be of assistance.

Note: Airport Legal Contact: Arlene Dykstra, telephone 303-342-2542.

Crandall v. Denver
Case No. 05-cv-00242-MSK-MEH

TRIAL EXHIBIT
62

[LOGO]
City & County of Denver

[LOGO]
DENVER
INTERNATIONAL
AIRPORT

Department of Aviation
Airport Office Building
8500 Peña Boulevard
Denver, Colorado 80249

303.342.2200
www.FlyDenver.com

February 25, 2005

Mr. Jim Kyte
United Airlines
8900 Pena Boulevard
Denver, CO 80249-6363

Subject: Full Gate Deicing
Denver International Airport

Dear Mr. Kyte:

On October 14, 2002, DIA provided Mr. Ken Bostock of United Air Lines (UAL) with approval to conduct full aircraft deicing of certain aircraft with inoperable APU's at concourse gates. This approval was granted with specific notification and clean-up requirements.

However, in light of the recent filing of the RCRA lawsuit in the United States District Court against the City and County of Denver (Denver International Airport), full aircraft deicing of any aircraft at a concourse gate will not be allowed as of March 11, 2005. UAL is to make any necessary arrangements to allow for all inoperable APU aircraft to be deiced at the dedicated deicing pads.

Sincerely,

/s/ Turner West
Turner West
Co-Manager of Aviation

cc: Mark Lovin, DIA Operations
Janell Barrilleaux, DIA Environmental Services
Nick Pijoan, Assistant City Attorney

Crandall v. Denver
Case No. 05-cv-00242-MSK-MEH

TRIAL EXHIBIT
70

Doiron, Judith

From: Rocek, Hanna – DIA

Sent: Tuesday, August 02, 2005 10:04 AM

To: Smith, Donald – DIA

Cc: Barrilleaux, Janell – DIA

Subject: FW: GRV issue/UAL

Don: How much funding do we have left for the UA pond after the apron and drainage?

From: Barrilleaux, Janell – DIA

Sent: Monday, August 01, 2005 5:01 PM

To: West, Turner – DIA

Cc: Rocek, Hanna – DIA; Barrilleaux, Janell – DIA

Subject: GRV issue/UAL

Turner:

As I mentioned this morning, I received an odd voice mail from Inland Technologies (recycle contractor) on Friday. The message spoke of an email from Washington Group requesting specifications on a glycol

recovery vehicle (GRV). The email apparently said that Washington was making this request on behalf of the City (on contract with the City).

I asked Mark Lovin if he knew anything about this and he does not. I have a call into Inland requesting the email or any information they can give me on requestor.

Pursuant to your request, I am putting a copy of the most recent letter to UAL stating that full aircraft deicing will not be allowed due to the litigation, etc. Hana, I am sending one to you as well FYI.

With respect to your other request on UAL issues in general, the main issues I can think of at this time are as follows:

1. I imagine UAL would like nothing better to be able to full aircraft deice on Concourse B. In light of the litigation that is scheduled for court in April 2007, the attorneys would most likely have a problem with allowing this to happen.

2. UAL wants the airport to pursue a single provider for deicing services at DIA.

3. The UAL hangar project is moving forward and the last I heard is that they really want a pond. Don Smith's project includes (Phase II) a pond for UAL. UAL's own people and contractors have said that a pond is not warranted; however, UAL stands firm. This might be a negotiating point but Don Smith

is the man most familiar with the current status.

Let me know if you need anything else from me.

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(2)

No. 10-84

Supreme Court, U.S.
FILED
AUG 16 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TERRI CRANDALL AND JOANN HUBBARD,

Petitioners,

v.

CITY AND COUNTY OF DENVER, COLORADO, D/B/A THE DENVER INTERNATIONAL AIRPORT, A COLORADO POLITICAL SUBDIVISION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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ANDREW J. CARAFELLI, ESQ.
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**Counsel of Record*

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STATUTES

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SUMMARY OF THE CASE

Petitioners Terri Crandall and JoAnn Hubbard sued Respondent City and County of Denver pursuant to the citizen-suit provision of the Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(a)(1)(B) ("RCRA"), seeking, among other things, mandatory injunctive relief prohibiting full-plane gate deicing at Denver International Airport ("DIA"). After a five-day trial, the District Court found that Denver no longer permits full-plane deicing at the gates, citing numerous reasons therefore, and held that Petitioners had not shown the current and future use of aircraft deicing fluid ("ADF") "may present an imminent and substantial endangerment to health," which is a prerequisite for injunctive relief under RCRA. In short, both the District Court and the Tenth Circuit Court of Appeals determined, based on facts in the record and applicable law, that Petitioners failed to make a case for RCRA liability, and the courts therefore denied the permanent injunctive relief Petitioners sought.

ARGUMENT

Petitioners brought this action against the City and County of Denver pursuant to the citizen-suit provision of RCRA, which provides that "any person may commence a civil action on his own behalf . . . against any person . . . who has contributed or who is contributing to the . . . handling . . . or disposal of any

solid . . . waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The lawsuit was based primarily on the allegation that the use of ADF at Concourse B of DIA may present an imminent and substantial endangerment to human health.

The ADF used at DIA is primarily composed of propylene glycol, which in its liquid form is not hazardous, but which can produce hydrogen sulfide gas when it decomposes. [Pet. Appx. page 48.] Exposure to very high levels of hydrogen sulfide gas can result in adverse health effects. For a period of time, Denver allowed full-plane deicing while airplanes were at the gates of Concourse B. During this period, there were a number of complaints about odors and health effects in Concourse B. The odor complaints were indicative of the presence of hydrogen sulfide gas. [Pet. Appx. pages 32-33.][1]

In February 2005, Petitioners brought this action to obtain an injunction prohibiting full-plane deicing at the gates of Concourse B. A short time thereafter, DIA sharply curtailed deicing at the concourse gates and directed that the procedure be conducted at deicing pads away from the gates. [Pet. Appx. page 35.] There were numerous economic and operational reasons for DIA's restriction of full-plane gate deicing procedures. [Pet. Appx. pages 60-61.] Subsequently,

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[1] All citations of "Pet. Appx." are references to the Petition for Writ of Certiorari.

there were far fewer odor complaints and no objective evidence of the presence of hydrogen sulfide gas in Concourse B. [Pet. Appx. pages 35-36; 50.]

Following a bench trial in April 2008, the District Court denied Petitioners' request for an injunction prohibiting Denver from resuming full-plane gate deicing at DIA. Specifically, the District Court rejected Petitioners' argument that the possibility of a resumption of full-plane gate deicing constituted an imminent and substantial endangerment sufficient to warrant injunctive relief under RCRA. [Pet. Appx. page 62.]

The District Court found that the policy of restricting full-plane gate deicing was the result of a number of economic and operational factors which were unrelated to Petitioners' lawsuit and which would continue to be in effect in the future. [Pet. Appx. pages 60-61.] The District Court concluded that Petitioners failed to prove a resumption of full-plane gate deicing after the conclusion of the litigation was likely as opposed to a mere speculative possibility. [Pet. Appx. page 19.] The District Court therefore concluded the possibility of a resumption of full-plane gate deicing did not constitute a present risk of a harm that may arise in the future from the use of propylene glycol. [Pet. Appx. pages 53; 60-62.]

The District Court went on to find that, even if there was a resumption of full-plane gate deicing, Petitioners failed to prove that the procedure would likely generate enough hydrogen sulfide gas to pose a

hazard to public health. [Pet. Appx. pages 61-62.] Based on these findings, the District Court ruled that Petitioners were not entitled to injunctive relief under RCRA because any potential endangerment from the future use of propylene glycol was neither substantial nor imminent. [Pet. Appx. page 62.]

The Tenth Circuit Court of Appeals affirmed the District Court's determination that Petitioners were not entitled to the issuance of a permanent injunction pursuant to RCRA. The Court of Appeals applied the standard elements for the issuance of a permanent injunction: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1180 (10th Cir. 2003). [Pet. Appx. page 10.] According to the Court of Appeals, the first element was dispositive because Petitioners failed to prove at trial that the possibility of a resumption of full-plane gate deicing presented an imminent and substantial endangerment to health.

The Court of Appeals' review of governing precedent began with the rule enunciated in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996), that RCRA's citizen-suit provision allows for only prospective relief, and it does not afford a remedy for past contamination that no longer poses a danger. [Pet. Appx. page 12.]

The Court of Appeals then reviewed decisions analyzing RCRA's provision concerning solid waste that "may present an imminent and substantial endangerment." The Court of Appeals discussed how these decisions explained that the "endangerment" addressed by RCRA is simply the current or imminent risk of a harm occurring in the future. [Pet. Appx. pages 12-15.] Accordingly, the statutory requirement of an "endangerment" is satisfied if a defendant's handling of a solid waste may create a present or imminent risk that a harm will result in the future if remedial measures are not taken. [Pet. Appx. page 16.]

Petitioners' claim for injunctive relief under RCRA failed, the Court of Appeals stated, because Petitioners did not meet their burden of proving that there was an imminent endangerment from the use of ADF at DIA. At the time of trial, there was no detectable hydrogen sulfide gas in Concourse B, and Petitioners were unable to establish a likelihood that the alleged endangering conduct (i.e., a resumption of full-plane gate deicing) was imminent after the termination of the lawsuit. [Pet. Appx. pages 17-18.] This evidentiary shortcoming was compounded by Petitioners' failure to present any evidence that a resumption of full-plane gate deicing would likely result in amounts of fugitive ADF sufficient to generate harmful levels of hydrogen sulfide gas. [Pet. Appx. pages 18-19.]

In assessing RCRA's provision concerning solid waste that "may present" an imminent and substantial endangerment, the Court of Appeals observed

that "there is a limit to how far the word 'may' can carry a plaintiff." [Pet. Appx. page 15.] In affirming the District Court's denial of a permanent injunction, the Court of Appeals made a straightforward application of the case law interpreting RCRA. As the Court of Appeals observed, the governing precedent makes clear that it is not enough under RCRA for a plaintiff to prove only that "in the future someone may do something with solid waste that, absent protective measures, can injure human health." [Pet. Appx. page 18.]

It is well settled that a plaintiff seeking an injunction has the burden of proving "that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed.2d 1303 (1953). The mere theoretical possibility of a repeat violation is not enough. *Cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

Petitioners have set up the proverbial "straw man" by erroneously asserting that they were denied the opportunity of obtaining injunctive relief under RCRA only because Denver curtailed full-plane gate deicing after Petitioners filed suit. Petitioners' burden of proof for obtaining a permanent injunction pursuant to RCRA was in no way affected by the timing of Denver's decision to restrict full-plane gate deicing. Petitioners simply did not present sufficient factual evidence to support their speculative assertion of imminent and substantial endangerment.

As the Court of Appeals observed, a permanent injunction presumably could have issued pursuant to RCRA if Petitioners were able to present evidence (1) that Denver would likely resume full-plane gate deicing and (2) that such a future resumption may result in the generation of hydrogen sulfide gas in amounts sufficient to endanger public health at DIA. [Pet. Appx. page 20.] Petitioners' failure of proof on both counts simply does not implicate any question of federal law that calls for the exercise of this Court's supervisory power.

CONCLUSION

Petitioners base their Petition for Writ of Certiorari on the incorrect assertion that Denver banned full-plane gate deicing "in direct response to Petitioners' RCRA citizen suit." In fact, the District Court made a factual finding that the policy of restricting full-plane gate deicing was the result of a number of economic and operational factors which were unrelated to Petitioners' lawsuit and which would continue to be in effect in the future.

Petitioners' failure of proof in this regard was compounded by the District Court's factual finding that, even if there was a resumption of full-plane gate deicing, Petitioners had not produced sufficient evidence to prove that the deicing procedure would likely

generate enough hydrogen sulfide gas to pose a hazard to public health.

Based on these two factual findings, the District Court concluded that Petitioners were not entitled to injunctive relief under RCRA because any potential endangerment from the future use of propylene glycol was neither substantial nor imminent.

On review, the Tenth Circuit Court of Appeals made a straightforward application of well-established case law and ruled that RCRA liability requires proof that a defendant's handling of a solid waste may create a present or imminent risk that a harm will result in the future if remedial measures are not taken. Applying established standards, the Court of Appeals concluded that a permanent injunction was not warranted because Petitioners failed to prove at trial (1) that Denver would likely resume full-plane gate deicing and (2) that a resumption of full-plane gate deicing may result in the generation of sufficient amounts of hydrogen sulfide gas to endanger public health at DIA.

The rulings by the District Court and the Tenth Circuit Court of Appeals were based on sound factual findings applied to settled law concerning the standards for imposing RCRA liability. Accordingly, the Petition for Writ of Certiorari does not present an important question of law that is worthy of this Court's consideration and review. Respondent City and County of Denver, Colorado, therefore respectfully

requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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**Counsel of Record*

Submitted August 13th, 2010